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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 STEVEN B.,

10 Plaintiff,

11 v.

12 COMMISSIONER OF SOCIAL SECURITY,

13 Defendant.

Case No. C20-5801-MLP

ORDER

14 **I. INTRODUCTION**

15 Plaintiff seeks review of the denial of his application for Disability Insurance Benefits.
16 Plaintiff contends the administrative law judge (“ALJ”) erred in: (1) assessing his residual
17 functional capacity (“RFC”), (2) discounting certain medical opinion evidence, (3) failing to
18 address the weight assigned to lay evidence, and (4) finding Plaintiff not disabled at step five.
19 (Dkt. # 16 at 1-2.) As discussed below, the Court REVERSES the Commissioner’s final decision
20 and REMANDS the matter for further administrative proceedings under sentence four of 42
21 U.S.C. § 405(g).

22 **II. BACKGROUND**

23 Plaintiff was born in 1979, graduated from high school, and previously worked as an
injection molding machine operator. AR at 37-38, 70, 197. Plaintiff was last gainfully employed

1 in September 2016. *Id.* at 197.

2 In May 2018, Plaintiff applied for benefits, alleging disability as of October 19, 2017. AR
3 at 177-80. Plaintiff's application was denied initially and on reconsideration, and Plaintiff
4 requested a hearing. *Id.* at 112-14, 119-27. After the ALJ conducted a hearing on October 2019
5 (*id.* at 32-81), the ALJ issued a decision finding Plaintiff not disabled. *Id.* at 15-27.

6 Utilizing the five-step disability evaluation process,¹ the ALJ found:

7 Step one: Plaintiff has not engaged in substantial gainful activity since November 28,
8 2017.

9 Step two: Plaintiff has the following severe impairments: depression, anxiety, somatic
10 symptom pain disorder, irritable bowel syndrome, hemochromatosis, osteoarthritis,
11 spondylosis, myofascial pain syndrome, calcium pyrophosphate deposition disease,
12 degenerative joint disease, and chondrocalcinosis.

13 Step three: These impairments do not meet or equal the requirements of a listed
14 impairment.²

15 RFC: Plaintiff can perform light work with additional limitations: he can occasionally
16 stoop and climb, and cannot crouch. He can frequently handle, finger, and reach. He can
17 occasionally interact with the public.

18 Step four: Plaintiff cannot perform past relevant work.

19 Step five: As there are jobs that exist in significant numbers in the national economy that
20 Plaintiff can perform, Plaintiff is not disabled.

21 AR at 15-27.

22 As the Appeals Council denied Plaintiff's request for review, the ALJ's decision is the
23 Commissioner's final decision. AR at 1-6. Plaintiff appealed the final decision of the
Commissioner to this Court. (Dkt. # 4.)

¹ 20 C.F.R. § 404.1520.

² 20 C.F.R. Part 404, Subpart P, Appendix 1.

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“Substantial evidence” is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one rational interpretation, it is the Commissioner’s conclusion that must be upheld. *Id.*

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1 I. Legal Standards

2 The regulations effective March 27, 2017, 20 C.F.R. §§ 404.1520c(c), 416.920c(c),
3 require the ALJ to articulate how persuasive the ALJ finds medical opinions and to explain how
4 the ALJ considered the supportability and consistency factors. 20 C.F.R. §§ 404.1520c(a), (b),
5 416.920c(a), (b). The regulations require an ALJ to specifically account for the legitimate factors
6 of supportability and consistency in addressing the persuasiveness of a medical opinion. Thus,
7 the regulations require the ALJ to provide specific and legitimate reasons to reject a doctor's
8 opinions. *See, e.g., Kathleen G. v. Comm'r of Social Sec. Admin.*, No. C20-461 RSM, 2020 WL
9 6581012, at *3 (W.D. Wash. Nov. 10, 2020) (finding that the new regulations do not clearly
10 supersede the "specific and legitimate" standard because the "specific and legitimate" standard
11 refers not to how an *ALJ* should weigh or evaluate opinions, but rather the standard by which the
12 *Court* evaluates whether the ALJ has reasonably articulated his or her consideration of the
13 evidence) (emphasis added).

14 Further, the Court must continue to consider whether the ALJ's analysis is supported by
15 substantial evidence. *See* Revisions to Rules Regarding the Evaluation of Medical Evidence, 82
16 Fed. Reg. 5852 (January 18, 2017) ("Courts reviewing claims under our current rules have
17 focused more on whether we sufficiently articulated the weight we gave treating source opinions,
18 rather than on whether substantial evidence supports our final decision ... [T]hese courts, in
19 reviewing final agency decisions, are reweighing evidence instead of applying the substantial
20 evidence standard of review, which is intended to be highly deferential standard to us."). With
21 these regulations and considerations in mind, the Court proceeds to its analysis of the medical
22 evidence in this case.

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1 2. *Dr. Yin's Opinion*

2 Dr. Yin treated Plaintiff on two occasions before completing a form opinion describing
3 his physical symptoms and limitations. AR at 476-79. The ALJ summarized Dr. Yin's opinion
4 and explained that he found it not persuasive because it was inconsistent with Dr. Yin's
5 treatment notes and other evidence in the medical record, which did not corroborate the severe
6 pain complaints and other symptoms Dr. Yin described. *Id.* at 24. The ALJ also found that the
7 imaging evidence revealed only mild abnormalities, which did not support the limitations Dr.
8 Yin indicated. *Id.* at 24-25. Lastly, the ALJ found that although Dr. Yin described specific
9 functional limitations in Plaintiff's ability to walk, stand, sit, lift, carry, use his
10 hands/fingers/arms, stay on task, maintain attendance, and persist through a workday, Dr. Yin's
11 treatment notes did not discuss these issues and there is "no indication Dr. Yin observed or
12 measured the effects of [Plaintiff's] condition that would support the degree of specificity
13 opined." *Id.* at 25.

14 Plaintiff contends that the ALJ played doctor in finding Dr. Yin's opinions to be
15 inconsistent with or unsupported by the medical record. (Dkt. # 16 at 12-13.) Plaintiff is
16 mistaken: the ALJ is tasked with determining whether medical opinions are supported by and
17 consistent with the medical record, under both the new regulations and preexisting Ninth Circuit
18 case law. *See, e.g., Carmickle v. Comm'r of Social Sec. Admin.*, 533 F.3d 1155, 1164 (9th Cir.
19 2008) ("The ALJ is responsible for resolving conflicts in the medical record."); *Bayliss*, 427 F.3d
20 at 1216 (rejecting physician's opinion due to discrepancy or contradiction between opinion and
21 the physician's own notes or observations is "a permissible determination within the ALJ's
22 province"); *Morgan v. Comm'r of Social Sec. Admin.*, 169 F.3d 595, 603 (9th Cir. 1999) (ALJ
23 appropriately considers internal inconsistencies within and between physicians' reports). In this

1 case, the ALJ properly considered whether the symptoms and limitations mentioned in Dr. Yin's
2 opinion were corroborated by or consistent with her treatment notes and/or other medical
3 evidence, and reasonably found that the lack of corroboration and inconsistencies undermined
4 the persuasiveness of Dr. Yin's opinion.

5 Specifically, the ALJ noted that although Dr. Yin indicated that Plaintiff rated his pain
6 7.5-8.5 out of 10 at each visit, Dr. Yin's treatment notes did not mention any pain rating and
7 instead described Plaintiff as in "no acute distress." AR at 24. Although Plaintiff disputes that
8 "no acute distress" is necessarily inconsistent with a high pain rating (dkt. # 16 at 12), Plaintiff
9 does not dispute that Dr. Yin's treatment notes include no pain ratings whatsoever, which is
10 inconsistent with the comments in her opinion. *See* AR at 498-506.

11 The ALJ also noted that the trigger points, tender points, and tenderness referenced by
12 Dr. Yin were not mentioned in her treatment notes, and that the record instead documented many
13 findings demonstrating normal functioning. AR at 24. Plaintiff's argument notwithstanding (dkt.
14 # 16 at 12), findings as to, *e.g.*, normal gait and normal strength are relevant to the walking and
15 lifting/carrying restrictions indicated by Dr. Yin, and the ALJ reasonably found these to be
16 inconsistent.

17 Furthermore, Plaintiff has not shown that the ALJ erred in finding that many of the
18 symptoms and limitations referenced in Dr. Yin's opinion are not mentioned anywhere in Dr.
19 Yin's treatment notes (AR at 25), and this reasoning also supports the ALJ's persuasiveness
20 assessment. Accordingly, because the ALJ reasonably explained why Dr. Yin's opinion is not
21 persuasive, and the ALJ's findings are supported by substantial evidence, the ALJ's assessment
22 of Dr. Yin's opinion is affirmed.

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1 3. *Dr. Parker's Opinion*

2 Dr. Parker examined Plaintiff in October 2018 and wrote a narrative opinion as to
3 Plaintiff's workplace abilities. AR at 334-37. Dr. Parker concluded:

4 DISCUSSION/PROGNOSIS: The claimant has received psychotherapy and
5 continues in psychotherapy. He does not identify depression or anxiety as being
disabling problems right now. Those are his own words.

6 FUNCTIONAL ASSESSMENT/MEDICAL SOURCE STATEMENT: He is able
7 to manage his own funds.

8 He can do tasks with normal pace and accuracy. He would be able to interact with
9 coworkers, supervisors and the public. His attendance would be limited by his
pain problems and his ability to manage stress would also be limited by his pain
problems.

10 *Id.* at 337. The ALJ found Dr. Parker's opinion to be persuasive because it was supported by his
11 examination findings and consistent with Plaintiff's treatment record. *Id.* at 25. The ALJ noted
12 that Dr. Parker attributed some limitations to Plaintiff's pain, but the ALJ found those to be
13 inconsistent with treatment notes showing that Plaintiff did not complain of pain at many
14 examinations and was consistently described as in no acute distress. *Id.*

15 A few of the treatment notes cited by the ALJ do in fact fail to mention any complaint of
16 pain (*id.* at 289, 310, 314, 400, 484-85), but many of the notes cited by the ALJ *do* mention
17 Plaintiff's reported pain, whether or not he was described as in "no acute distress." *See id.* at 297,
18 319, 352, 377, 385, 392, 395, 456, 502, 507. An observation of a claimant being in "no acute
19 distress" does not on its own reasonably undermine a claimant's complaint of pain, either, and
20 the Commissioner does not defend this line of reasoning. *See, e.g., Havrylovich v. Astrue*, 2011
21 WL 284731, at *7 (D. Or. Jan. 25, 2011) (finding observations of a claimant in "no apparent
22 distress" did not provide a sufficient basis to reject a treating doctor's opinion as to the
23 claimant's limitations). Thus, the ALJ misrepresented the record when finding that Plaintiff did

1 not complain of pain at the examinations cited and erred in finding that the treatment notes
2 objectively contradicted his complaints of pain.

3 Although the Commissioner stresses that the ALJ “repeatedly referenced the lack of
4 subjective pain complaints” in the decision (dkt. # 17 at 10³), the Commissioner does not and
5 cannot show that all of the evidence cited by the ALJ supports that purported lack of pain
6 complaints, as discussed *supra*. Accordingly, the Court finds that the ALJ erred in failing to
7 adequately explain why he did not find persuasive Dr. Parker’s opinions as to Plaintiff’s
8 limitations caused by pain.⁴

9 **B. The ALJ Did Not Err in Assessing Plaintiff’s Physical RFC**

10 Plaintiff argues that the ALJ erred in failing to express his RFC on a function-by-function
11 basis. (Dkt. # 16 at 9-10 (citing Social Security Ruling (“SSR”) 96-8p, 1996 WL 374184 (Jul. 2,
12 1996)).) SSR 96-8p requires that the “RFC assessment must first identify the [claimant’s]
13 functional limitations or restrictions and assess his or her work-related abilities on a function-by-
14 function basis,” specifically the physical, mental, and other abilities affected by a claimant’s
15 impairments. 1996 WL 374184 at *1 (referencing 20 C.F.R. §§ 404.1545(b)-(d), 416.945(b)-(d)).

16 As noted *supra*, the ALJ’s RFC assessment refers to Plaintiff’s ability to perform light
17 work as defined in 404 C.F.R. §404.1567(b) but does not explicitly define Plaintiff’s abilities as
18 to sitting, standing, walking, lifting, and carrying. AR at 19. Plaintiff notes that light work is
19 defined to require the ability to stand/walk for six hours of an eight-hour workday and
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21 ³ The Court also notes that the Commissioner’s brief has a formatting irregularity, namely condensed
22 spacing, that hinders readability. In the future, the Commissioner shall refrain from using this feature. *See*
Local Civil Rule 10(e)(1) (W.D. Wash.) (requiring the use of a proportionally spaced font in briefing).

23 ⁴ In light of this finding, the Court need not address Plaintiff’s related arguments regarding Dr. Parker’s
opinion and whether it was fully accounted for in the RFC assessment. (Dkt. # 16 at 7-9.) On remand, the
ALJ shall reconsider Dr. Parker’s opinion in its entirety and provide a legally sufficient discussion of its
persuasiveness and reassess Plaintiff’s mental RFC in light of the assessment of that opinion.

1 emphasizes that he testified that he could only walk or sit 10-15 minutes at a time and required
2 the use of a cane. (Dkt. # 16 at 10.)

3 In this way, Plaintiff's RFC argument rises and falls with the sufficiency of the ALJ's
4 assessment of Plaintiff's subjective testimony. The ALJ summarized Plaintiff's allegations and
5 explained that he discounted them because the objective evidence was inconsistent with
6 Plaintiff's allegations, Plaintiff did not report the symptoms to his providers that he claimed were
7 disabling, some of Plaintiff's symptoms improved with treatment, and Plaintiff's activities were
8 inconsistent with the limitations he alleged. AR at 20-23. Plaintiff's opening brief does not
9 assign error to the ALJ's assessment of his subjective complaints, which is fatal to his claim of
10 error in the RFC. Plaintiff has not shown that the ALJ harmfully erred in discounting his alleged
11 walking and sitting limitations, or his need for a cane, and thus has not shown that the ALJ erred
12 in failing to account for these allegations when crafting the RFC assessment. *See Bayliss*, 427
13 F.3d at 1217-18 ("In making his RFC determination, the ALJ took into account those limitations
14 for which there was record support that did not depend on Bayliss's subjective complaints.
15 Preparing a function-by-function analysis for medical conditions or impairments that the ALJ
16 found neither credible nor supported by the record is unnecessary.").

17 **C. The ALJ Must Reconsider Other Aspects of the Decision on Remand**

18 Because, as explained *supra*, this case must be remanded for the ALJ's reconsideration of
19 Dr. Parker's opinion, the ALJ should also explicitly assess Plaintiff's wife's hearing testimony
20 and either credit it or provide legally sufficient reasons to discount it. The Court need not address
21 Plaintiff's step-five arguments because that portion of the ALJ's decision may be impacted by
22 the ALJ's reconsideration of other parts of the decision.
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Dated this 14th day of May, 2021.

MICHELLE L. PETERSON
United States Magistrate Judge